

In the Matter of Merchant Mariner's Document No. Z674696 and all other Licenses and Documents

Issued to: LONNIE RALEIGH

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

950

LONNIE RALEIGH

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 24 August 1956, an Examiner of the United States Coast Guard at Boston, Massachusetts, suspended Merchant Mariner's Document No. Z-674696 issued to Lonnie Raleigh upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a utilityman on board the American SS CILCO RANGER under authority of the document above described, on or about 12 June 1956, while said vessel was at sea, he assaulted and battered a crew member named Franciszek E. Marczek.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. The Examiner denied counsel's motion that the Examiner disqualify himself because he previously heard and dismissed the case against Marczek wherein he was charged with assault and battery on Appellant in connection with the incident under consideration herein. Appellant then entered a plea of "not guilty" to the charges and specifications.

The parties stipulated in evidence the prior testimony of three persons which had been taken in the presence of the Investigating Officer and counsel for Appellant. Marczek and the Master of the ship had testified as witnesses of the Investigating Officer. The third person was the Chief Engineer who testified for Appellant. the parties also stipulated in evidence entries in the Official Logbook which referred to Appellant and Marczek. Appellant testified under oath at the hearing.

At the conclusion of the hearing, having given both parties an opportunity to submit argument as well as proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the

order suspending Appellant's Merchant Mariner's Document No. Z-674696, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of one month.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 12 June 1956, Appellant was serving as a utilityman on board the American SS CILCO RANGER and acting under authority of his Merchant Mariner's Document No. Z-674696 while the ship was at sea. Franciszek E. MarczeK was employed as Chief Steward on the ship.

At approximately 1100 on this date, MarczeK approached Appellant while he was working in the starboard passageway near the ship's hospital. MarczeK told Appellant that his claim for overtime pay for 13 May had been disallowed. While the two seamen exchanged heated words, Appellant took off his glasses and put them in a side pocket of his pants. Appellant then struck MarczeK on the face causing him to fall to the deck. MarczeK's nose commenced bleeding from the blow and his mouth was cut. There was no indication that Appellant had been injured in any manner. He left the scene immediately while MarczeK was still on the deck and reported the incident to the Master. MarczeK did not strike Appellant.

Appellant had given his version to the Master, placing the blame on MarczeK, by the time the latter reached the Master's cabin. MarczeK's nose and mouth were bleeding and he was in a dazed condition. Since both men said that there were no other eyewitnesses to the incident and that the other seaman initiated the trouble, no action was taken by the Master. At this time, Appellant did not claim that he had been injured or that his glasses had been broken during the incident.

MarczeK received first aid treatment for his facial injuries and both men continued to perform their duties. A few days later, Appellant complained that his back was hurting. He continued to work until 27 or 28 June. On 30 June, Appellant was examined by a Public Health doctor at Coos Bay, Oregon. The doctor reported that Appellant has two fractured ribs.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner should have disqualified himself because he had conducted a hearing against Marczek, pertaining to the same incident, and dismissed the charge of assault and battery. Since the Examiner had prejudged the case against Appellant and formed a fixed opinion after hearing the testimony of Appellant and Marczek at the previous hearing, the Examiner could not render a fair and impartial judgment in the present case. Hence, Appellant was deprived of his Constitutional right of due process and his rights under the Administrative Procedure Act.

APPEARANCE: Nathan Greenberg, Esquire, of Boston,
Massachusetts, of Counsel.

OPINION

This appeal is based solely on the ground that the Examiner should have disqualified himself because he had prejudged this case by dismissing the action against Chief Steward Marczek. Appellant relies on three court decisions which have been reviewed and are not considered to have a direct bearing on this point.

The Administrative Procedure Act (5 U.S.C. 10006(a)) and our regulations (46 CFR 137.09-5(e)) provide that a party may request an Examiner to withdraw by filing an affidavit of personal bias or disqualification when it is felt that such Examiner is not able to conduct the hearing in an impartial manner.

With respect to court actions, it has been held that the bias and prejudice must be "personal" in nature and a judge cannot be disqualified solely on the basis of a judicial opinion, formed against a party, acquired from evidence presented in the course of prior judicial proceedings before the same judge when such party was not a defendant. Ferrari v. United States (C.C.A. 9, 1948), 169 F2d 353; Parker v. New England Oil Corporation (D.C. Mass., 1926), 13 F2d 497. Neither of these cases was tried to a jury and the former was a narcotics case where Appellant's name had been mentioned "in connection with very damaging evidence" in another case in which Appellant was not a defendant. In other words, "personal bias," as a pre-requisite to disqualify a judge, must be an attitude of extrajudicial origin. Craven v. United States (C.C.A.1, 1927), 22 F2d 605. (An exhaustive review of the treatment of this subject is the Federal courts is contained in United States v. Valenti (D.D.N.J., 1954), 120 F.Supp. 80.)

Similarly, the Supreme Court has stated that there is no warrant for imposing upon administrative agencies a stiffer rule than is the rule in judicial administration, under 28 U.S.C. 144

(Bias or prejudice of judge), with respect to disqualification, even where there is a rehearing before the same examiner after he has been reversed on earlier rulings against a party. N.L.R.B. v. Donnelly Garment Co. (1947), 330 U.S. 219.

In effect, these cases completely refute Appellant's contention that he was denied due process and his rights under the Administrative Procedure Act were violated.

Another element to be considered was the availability of another Examiner to preside in this case. The record indicates that an unsuccessful attempt was made to obtain another Examiner. The rule as to disqualification on the ground of personal bias or prejudice must yield to the demands of necessity when no other tribunal is available to hear and decide the cause. 33 Corpus Juris 989.

On the merits of the case, it is noted that Appellant's testimony was as follows. Marczek struck Appellant on his left cheek knocking off his glasses which fell to the deck and broke. The force of this blow caused Appellant to fall against the hospital door frame bruising his left side in the vicinity of his ribs. Marczek grabbed Appellant and he shoved Marczek to a sitting position before leaving for the Master's cabin. Appellant saw the Chief Engineer witness the incident. Appellant did not tell the Master there were no witnesses or that there had been an argument about overtime.

The Chief Engineer testified on direct examination that Marczek struck Appellant on the side of his face after an argument. On cross-examination, the Chief Engineer stated that he saw the Chief Steward sitting on the deck when the Chief Engineer looked down the passageway; and that Appellant had his back turned to the Chief Engineer. The latter admitted that there was "bad feeling" between himself and the Chief Steward. Because of the divergence between the Chief Engineer's testimony on direct and cross-examination, his statements do not lend much weight to either side although the animosity between him and Maarczek indicates that the Chief Engineer would favor the cause of Appellant. consequently, it does not seem to make any difference whether or not the Chief Engineer was an eyewitness to a portion of the incident.

In addition to the fact that the Examiner specifically rejected Appellant's testimony after hearing and observing him testify, Appellant's credibility is seriously reflected upon in several respects.

It is difficult to understand how Appellant could have injured

his left side if he was caused to fall against the door frame by a blow on the left side of his face. Such a blow would have caused Appellant to fall to the right rather than to the left. (Competent counsel for Appellant did not attempt to establish a casual connection between this incident and the two fractured ribs which were referred to in one of the Official Logbook entries stipulated in evidence.) Appellant did not tell the Master that he had been injured or that his glasses has been broken when Marczek struck Appellant. In fact, the record does not show that Appellant made any claim that his glasses had been broken until the time of the hearing. Apparently Appellant's face was not injured although it almost certainly would have been if he had been struck hard enough to knock off his glasses and force him against the door frame injuring his side. On the contrary, Marczek's face was bleeding profusely and he was in a dazed condition.

Obviously, the incident was started by an argument as to whether Appellant would receive overtime pay although Appellant denied this in his testimony. Otherwise, there would have been no reason for the subsequent trouble. It logically follows that Appellant was the one who had a motive to become angry and strike Marczek when he informed Appellant that his claim for overtime had been disallowed.

With respect to whether the Chief Engineer was an eyewitness, the Master, Marczek and the Official Logbook entry all stated that the two seamen agreed immediately after the incident that there had been no such witnesses except the participants. Furthermore, it is evident that Appellant could not have seen the Chief Engineer, as Appellant testified, if the Chief Engineer saw part of the incident and Appellant's back was turned to the Chief Engineer as he stated in his testimony.

In view of these fallacies in Appellant's testimony, there is no reason why the Examiner's findings of fact, which are substantially in accord with the version presented by Marczek, should not be accepted.

ORDER

The order of the Examiner dated at Boston, Massachusetts, on 24 August 1956, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 25th day of January, 1957.